# Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K24–63 OF 1994
ABDUL KADIR SULAIMAN J
24 NOVEMBER 1994

***Constitutional Law*** *— Constitution — Sabah — Resignation of Chief Minister — Loss of confidence by majority of Legislative Assembly — Whether must be determined by vote in Legislative Assembly — Whether extraneous circumstances sufficient — No resignation tendered on behalf of other members of Cabinet — Whether appointments of other Cabinet members affected — Sabah State Constitution art 7(1)*

***Constitutional Law*** *— Executive — Appointment of new Chief Minister — Dissolution of Cabinet due to loss of confidence of majority of Legislative Assembly in previous Chief Minister — Whether dissolution recognized by established convention or under Constitution — Whether appointment of new Chief Minister and Cabinet valid if there are no resignations by or revocations of appointments of previous Cabinet Ministers — Sabah State Constitution arts 6(1) & 7(1)*

***Words and Phrases*** *— 'Confidence' — Sabah State Constitution art 7(1)*

Following the Sabah state elections on 18 and 19 February 1994, Datuk Joseph Pairin Kitingan ('Datuk Pairin') was appointed Chief Minister of Sabah. On the advice of Datuk Pairin, other elected members from his party, including the plaintiff, were appointed to form the State Cabinet on 21 February 1994. Subsequent to defections by three members of the State Legislative Assembly ('the Assembly') from his party to the opposition, Datuk Pairin requested the Yang di-Pertua Negeri, the first defendant, to dissolve the Assembly but the first defendant withheld his consent. Datuk Pairin later tendered his resignation as Chief Minister of Sabah on 17 March 1994. He, however, did not tender the resignation of the other members of his Cabinet. On the same day, the first defendant appointed the second defendant as the new Chief Minister to replace Datuk Pairin. On 24 March 1994, the first defendant, on the advice of the second defendant, appointed the third to ninth defendants as the other members of the Cabinet of the second defendant. The plaintiff sought a declaration that since no motion of no confidence was ever tabled in the Assembly against Datuk Pairin, his resignation was personal to him and did not affect the appointment of the plaintiff as a Deputy Chief Minister and Minister of Agriculture and Fisheries. The plaintiff also sought a declaration that the first defendant had acted ultra vires the provisions of the Sabah State Constitution ('the Constitution') by purportedly appointing the third to ninth defendants as members of the Cabinet when at all material times the appointments

of the plaintiff and the other Cabinet members had not been revoked nor had they resigned. A

**Held,** dismissing the application with costs:

(1) Under art 7(1) of the Constitution, if the Chief Minister ceases to command the confidence of a majority of the members of the Assembly, then he shall tender the resignation of the members of the Cabinet. The mere fact that Datuk Pairin chose to tender only his resignation as the Chief Minister would not make the other members of the Cabinet remain in office. The resignation of Datuk Pairin was a resignation of the whole of his Cabinet including the plaintiff and the issue of the resignation and the revocation of the appointment of the other Cabinet members did not arise. The intention behind the requirement in art 7(1) of the Constitution for a Chief Minister to tender the resignation of the members of the Cabinet was to enable a new Cabinet to be formed pursuant to art 6 of the Constitution. B C D

(2) A vote in the Assembly is not the only means to determine the confidence of the members of the Assembly in the Chief Minister but depends on the circumstances. Other extraneous matters may provide sufficient evidence to establish the fact of the Chief Minister ceasing to command the confidence of a majority of the members of the Assembly for the purposes of art 7(1) of the Constitution. E

(3) The dissolution of the existing Cabinet under art 7 does not involve the Yang di-Pertua Negeri or necessarily, the members of the Assembly. The Article merely requires the Chief Minister to tender the resignation of the members of his Cabinet if he ceases to command the confidence of a majority of the members of the Assembly. F

(4) Under art 7(1) and through established convention, the Cabinet may also be dissolved on account of the Chief Minister losing the confidence of a majority of the members of the Assembly which can be evidenced by various circumstances. The Constitution does not state that the only evidence of such fact must be through the actual vote in the Assembly. Thus if the Chief Minister does not tender the resignation of the other members of his Cabinet wherein the Cabinet is to be treated as dissolved under art 7(1) of the Constitution, their offices are deemed to have been vacated. G H

(5) As the Cabinet constituted on 21 February 1994 had been dissolved, the appointment of the second defendant as the new Chief Minister by the first defendant on 17 March 1994 was valid and constitutional, as were the appointments of the second to the ninth defendants on 24 March 1994 under art 6(3) of the Constitution. I

**Per curiam:**

(1) Apart from the constitutional provisions, it is a well-established convention in Sabah that upon the death or resignation of the Chief Minister, the Cabinet stands dissolved. The appointments of all its members are deemed to be vacated, and if any of the members are to continue to be in the new Cabinet, they have to be reappointed upon the advice of the new Chief Minister.

(2) Article 6(1) of the Constitution cannot be read to mean that there must be a Cabinet in existence at all times. It can only be read to mean that there must be a Cabinet to advise the Yang di-Pertua Negeri, for the Yang di-Pertua cannot dispense with this body if he is to exercise his constitutional functions.

**[Bahasa Malaysia summary**

Berikutan daripada pilihanraya negeri Sabah pada 18 dan 19 Februari 1994, Datuk Joseph Pairin Kitingan ('Datuk Pairin') telah dilantik sabagai Ketua Menteri Sabah. Atas nasihat Datuk Pairin, ahli-ahli lain partinya yang juga telah dipilih, termasuk plaintif, telah dilantik untuk menubuhkan Kabinet Negeri pada 21 Februari 1994. Selepas pembelotan tiga orang ahli Dewan Perundangan Negeri ('Dewan itu') daripada partinya kepada pihak pembangkang, Datuk Pairin telah memohon kepada Yang di-Pertua Negeri, yakni defendan pertama, untuk membubarkan Dewan itu tetapi defendan pertama tidak memberi persetujuannya. Datuk Pairin kemudiannya meletakkan jawatan sebagai Ketua Menteri Sabah pada 17 Mac 1994. Beliau, walau bagaimanapun, tidak meletak jawatan bagi pihak ahli-ahli lain Kabinetnya. Pada hari yang sama, defendan pertama telah melantik defendan kedua sebagai Ketua Menteri yang baru untuk menggantikan Datuk Pairin. Pada 24 Mac 1994, defendan pertama, atas nasihat defendan kedua, telah melantik defendan kedua hingga kesembilan sebagai ahli lain Kabinet defendan kedua. Plaintif memohon deklarasi bahawa memandangkan usul tidak percaya tidak dikemukakan di Dewan itu terhadap Datuk Pairin, perletakan jawatannya itu adalah secara peribadi baginya, dan tidak membawa kesan ke atas perlantikan plaintif sebagai seorang Timbalan Ketua Menteri dan Menteri Pertanian dan Perikanan. Plaintif juga memohon satu deklarasi bahawa defendan pertama telah bertindak ultra vires peruntukan Perlembagaan Negeri Sabah ('Perlembagaan itu') apabila beliau kononnya telah melantik defendan ketiga hingga kesembilan sebagai ahli Kabinet sedangkan pada semua masa yang berkenaan, perlantikan plaintif dan ahli Kabinet yang lain masih belum dibatalkan mahupun mereka telah meletakkan jawatan.

**Diputuskan,** menolak permohonan itu dengan kos:

(1) Di bawah perkara 7(1) Perlembagaan itu, jika Ketua Menteri tidak lagi memegang keyakinan suatu majoriti ahli-ahli Dewan

itu, maka beliau patut meletakkan jawatan ahli-ahli Kabinetnya. Hakikat bahawa Datuk Pairin memilih untuk meletakkan jawatannya sebagai Ketua Menteri sahaja tidak akan mengekalkan ahli lain Kabinetnya dalam jawatan mereka. Perletakan jawatan Datuk Pairin adalah perletakan jawatan oleh seluruh Kabinetnya termasuk plaintif dan isu perletakan jawatan dan pembatalan perlantikan ahli lain Kabinet tidak timbul. Tujuan di sebalik keperluan di bawah perkara 7(1) Perlembagaan itu supaya seorang Ketua Menteri meletakkan jawatan ahli Kabinetnya adalah untuk membolehkan satu Kabinet baru dibentuk mengikut perkara 6 Perlembagaan itu.

(2) Satu pengambilan undi di Dewan itu bukanlah satu-satunya cara untuk menentukan keyakinan ahli Dewan itu terhadap Ketua Menteri tetapi ianya bergantung kepada keadaan yang wujud. Perkara luar yang lain boleh memberikan bukti yang mencukupi untuk membuktikan hakikat bahawa Ketua Menteri telah kehilangan keyakinan suatu majoriti ahli Dewan itu bagi tujuan perkara 7(1) Perlembagaan itu.

(3) Pembubaran Kabinet di bawah perkara 7 tidak melibatkan Yang di-Pertua Negeri atau semestinya ahli Dewan itu. Perkara itu hanya memerlukan Ketua Menteri meletakkan jawatan ahli Kabinetnya jika beliau tidak lagi memegang keyakinan suatu majoriti ahli Dewan itu.

(4) Di bawah perkara 7(1) dan mengikut konvensyen yang mantap, suatu Kabinet itu boleh juga dibubarkan atas sebab Ketua Menteri telah kehilangan keyakinan suatu majoriti ahli Dewan itu yang boleh dibuktikan melalui berbagai keadaan. Perlembagaan itu tidak menyatakan bahawa bukti tunggal hakikat sedemikian mestilah diperolehi menerusi pengambilan undi di Dewan itu. Oleh itu jika Ketua Menteri tidak meletakkan jawatan ahli lain Kabinetnya walhal Kabinet itu disifatkan sebagai telah dibubarkan di bawah perkara 7(1) Perlembagaan itu, jawatan mereka akan dianggap sebagai telah dikosongkan.

(5) Oleh kerana Kabinet yang ditubuhkan pada 21 Februari 1994 telah dibubarkan, perlantikan defendan kedua sebagai Ketua Menteri baru oleh defendan pertama pada 17 Mac 1994 adalah sah dan mengikut Perlembagaan, begitu juga perlantikan defendan kedua hingga kesembilan pada 24 Mac 1994 di bawah perkara 6(3) Perlembagaan itu.

**Per curiam:**

(1) Selain daripada peruntukan Perlembagaan, adalah menjadi konvensyen yang mantap di Sabah bahawa berikutan dengan kematian atau perletakan jawatan Ketua Menteri, Kabinet itu dibubarkan. Perlantikan kesemua ahlinya dianggap sebagai telah dikosongkan, dan jika mana-mana ahli itu bakal menganggotai

Kabinet yang baru, mereka mesti dilantik semula atas nasihat Ketua Menteri yang baru.

(2) Perkara 6(1) Perlembangan itu tidak boleh dibaca sebagai membawa makna bahawa pada kesemua masa sesuatu Kabinet mesti wujud. Ianya hanya boleh dibaca sebagai membawa makna bahawa mestilah terdapat suatu Kabinet untuk menasihatkan Yang di-Pertua Negeri, memandangkan bahawa Yang di-Pertua Negeri tidak boleh bertindak tanpa badan ini jika beliau ingin menjalankan fungsi perlembagaannya.]

**Notes**

For cases on constitutional law, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 761–776, 828–832; [1993] Mallal's Digest 407–408.

**Cases referred to**

*Adegbenro v Akintola* [1963] AC 614; [1963] 3 All ER 544; [1963] 3 WLR 63 (folld)

*Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 (distd)

**Legislation referred to**

Sabah State Constitution arts 6, 7, 9(1), 10(2)(a), (b), 14(1)(c), (2)
Constitution of India art 74(1) [Ind]
Constitution of Western Nigeria s 33(10) [Nigeria]

*Raja Aziz Addruse* (*Yunof E Maringking* with him) (*Maringking & Co*) for the plaintiff.

*Abdul Ghani Patail* (Senior Federal Counsel) (*Wong Kian Kheong* (Federal Counsel) and *Halimah Nawab Khan* (Sabah State Attorney General's Office) with him) for the first, second, and fourth to ninth defendants.

*Lawrence Chong* (*Yong & Chia Advocates*) and *Venugopal Sukumaran* (*J Ambrose & Co Advocates*) for the third defendant.

*Cur Adv Vult*

**Abdul Kadir Sulaiman J**: On 18 and 19 February 1994, there was a State election held in Sabah to elect 48 members to the Legislative Assembly as provided for under art 14(2) of the Constitution of the State of Sabah. However, by virtue of art 14(1)(c), the Sabah Legislative Assembly shall consist also of not more than six other nominated members. Members of two major political parties, the Parti Bersatu Sabah (hereinafter referred to as 'the PBS') under the leadership of Datuk Joseph Pairin Kitingan and the State Barisan Nasional (hereinafter referred to as 'the BN') under the leadership of Tan Sri Hj Sakaran Dandai, the second defendant, contested in the said election. The plaintiff belongs to the PBS, and all three of them contested in the election and won. When the results of the election were

announced, the PBS won 25 of the total elected seats as against the BN which managed to obtain the 23 remaining seats. So, PBS obtained a majority of the members in the Legislative Assembly by two elected seats. As the leader of the party that had won a majority of the elected seats and a member of the Assembly, Datuk Pairin was, on 21 February 1994, duly appointed by the Yang di-Pertua Negeri, the first defendant, as the Chief Minister of Sabah and on his advice, other elected members from the PBS, including the plaintiff, were appointed in accordance with art 6(3) of the Constitution to form the State Cabinet. For the purpose of art 14(1)(c) of the Constitution, the Sabah Legislative Assembly also has six nominated members appointed. Thus, for the purpose of art 14, the Sabah Legislative Assembly consists of 54 members in all, both elected and nominated. In accordance with art 9(1) of the Constitution the plaintiff was one of the Ministers and was assigned the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries.

On 17 March 1994, Datuk Pairin tendered his resignation as the Chief Minister of Sabah but he did not tender the resignation of the other members of his Cabinet. On the same day the Yang di-Pertua Negeri, the first defendant, appointed the second defendant as the new Chief Minister to replace Datuk Pairin. On 24 March 1994, the first defendant on the advice of the second defendant, appointed the third to ninth defendants as other members of the Cabinet of the second defendant. Until this time, the other members of the previous Cabinet under Datuk Pairin did not tender their resignations and neither were their appointments revoked by the Yang di-Pertua Negeri.

By an amended originating summons, the plaintiff sought the following declarations:

(1) A declaration that since no motion was ever tabled in the State Assembly against Datuk Joseph Pairin Kitingan so as to determine whether or not he had lost the confidence of the majority of the members of the Legislative Assembly for the purpose of art 7(1) of the State Constitution of Sabah (the State Constitution), the resignation of Datuk Joseph Pairin Kitingan on 17 March 1994 was personal to him as a member of the State Cabinet under art 7(2) of the State Constitution and has no effect on the appointment of the plaintiff as a Deputy Chief Minister and Minister of Agriculture and Fisheries.

(2) A declaration that the first defendant as the head of the State of Sabah acted ultra vires the provisions of the State Constitution by purportedly appointing the third to ninth defendants as members of the Sabah State Cabinet on 24 March 1994 when at all material times the appointments of the plaintiff and the other Cabinet members who were earlier appointed on 21 February 1994 under art 6(2) of the State Constitution had not been revoked nor had they resigned.

(3) A declaration that the appointment of the plaintiff as a member of the State Cabinet by the first defendant under an instrument dated 21 February 1994 had not been legally revoked and still subsists in law and hence the plaintiff is still a member of the Sabah State Cabinet under the Chief Ministership of the second defendant and assigned to

A the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries and is legally entitled to receive emoluments and/or allowances.

(4) Alternatively, a declaration that the appointments of the second to ninth defendants are invalid because the first defendant acted ultra vires the State Constitution by relying upon the purported petition signed by 30 assemblymen outside the Legislative Assembly.

B However, on the date of hearing of this application, the learned counsel for the plaintiff formally abandoned prayer (4) above, leaving the plaintiff with only the first three prayers. Therefore, the appointment of the second defendant by the first defendant on 17 March 1994 is no longer in issue, and was, therefore, accepted as being validly made.

C For the plaintiff, there is his affidavit in support of this application, affirmed on 20 May 1994 and one other affidavit affirmed by Datuk Joseph Pairin Kitingan on 9 July 1994. For the defendants, 11 affidavits-in-reply were filed. The facts in this case are not seriously in dispute. The affidavit of Datuk Pairin for the plaintiff discloses that on D 19 February 1994, the Sabah state election results were announced in that 25 seats were won by the PBS and 23 seats by the BN. Subsequently, he was appointed as the Chief Minister of Sabah and on the same day, other Ministers, including the plaintiff, were appointed to form the Cabinet. On 13 March 1994, because of three defections by assemblymen from the E PBS to the BN, he requested the first defendant for the dissolution of the Assembly so as to call for a fresh mandate from the people. However, the consent to his request was withheld by the first defendant. Then on 16 March 1994, he saw 'as announced through RTM, the so-called petition with signatures purported to be those of the members of the Legislative Assembly'. On 17 March 1994, he resigned as the Chief F Minister but he did not tender the resignation of the other Cabinet members because the ground for his resignation was personal to him and on the same day, the first defendant appointed the second defendant as the Chief Minister of Sabah. On 24 May 1994, 'the new Cabinet was appointed but the old Cabinet's appointments were never revoked'. Finally, he states G that his intention was to resign from the post of Chief Minister only without involving the other members of the Cabinet as was clearly stated in his press statement when he announced his resignation.

The affidavit in support of the plaintiff discloses that on 21 February 1994, the first defendant appointed Datuk Pairin as the Chief Minister of Sabah. On the advice of Datuk Pairin, the first defendant on the same day, H appointed the plaintiff together with seven others as members of the Cabinet, and assigned the plaintiff to the portfolio of Deputy Chief Minister and Minister of Agriculture and Fisheries. On 16 March 1994, pursuant to defections of assemblymen from the PBS to the BN, 30 members sent a petition to the first defendant demanding the resignation of Datuk Pairin I as the Chief Minister of Sabah and on 17 March 1994, Datuk Pairin resigned as the Chief Minister. The plaintiff, however, did not tender his resignation. On the same day, the first defendant appointed the second defendant as the new Chief Minister. However, on 24 March 1994, on the

advice of the second defendant, the first defendant appointed the third to the ninth defendants as Ministers in the Cabinet of the second defendant without revoking the appointment of the plaintiff and his colleagues in the previous Cabinet. The plaintiff contends that the resignation of Datuk Pairin on 17 March 1994 was personal to him and, therefore, it did not affect the status of the other members of his Cabinet, including him, for there was no motion tabled in the Legislative Assembly to determine whether or not the former Chief Minister had ceased to command the confidence of a majority of the members of the Assembly. Consequently, the appointments of the third to ninth defendants on 24 March 1994 was ultra vires the Sabah Constitution.

For the defendants, the affidavit-in-reply No 4 affirmed by the first defendant on 7 September 1994 reveals that on 13 March 1994, Datuk Pairin requested him to dissolve the State Legislative Assembly but he withheld consent to the request in exercise of his personal discretion under art 10(2)(b) of the Constitution. Article 10(2)(b) states that the Yang di-Pertua Negeri may act in his discretion in the performance of the appointment of a Chief Minister and the withholding of consent to a request for the dissolution of the Legislative Assembly. Then on 16 March 1994, his office received a petition signed by 30 members of the Legislative Assembly, inter alia, declaring that they no longer had any confidence in nor would give any support to Datuk Pairin as the Chief Minister and requested to procure the resignation of Datuk Pairin as Chief Minister. The petition also requested that in the event Datuk Pairin refused to either resign or subject himself to a test of confidence, the first defendant was to invite the second defendant to form a new government. The aforesaid petition is exhibited as 'TYT–4' and the contents are as follows:

Tuan Yang Terutama
Tun Haji Said Bin Keruak
d/a Istana
Kota Kinabalu
Sabah

Tarikh: 16 Mac 1994

Tuan Yang Terutama Tun

(1) Kami selaku Ahli-ahli Dewan Undangan Negeri (ADUN) Sabah yang baru dipilih dan sebagai penyokong Barisan Nasional dengan hormatnya memaklumkan kepada Tun bahawa kami tidak lagi mempunyai kepercayaan kepada Datuk Seri Joseph Pairin Kitingan dan kami tidak akan menyokong Datuk Seri Joseph Pairin Kitingan, pemimpin Parti Bersatu Sabah sebagai Ketua Menteri Sabah.

(2) Kami juga memohon memaklumkan Tun bahawa Barisan Nasional dan penyokong-penyokongnya sekarang menguasai majoriti di kalangan ahli-ahli Dewan Undangan Negeri.

(3) Oleh itu dengan segala hormatnya kami ingin menegaskan bahawa Datuk Seri Joseph Pairin Kitingan atau pemimpin-pemimpin dan parti-parti politik atau campuran parti-parti politik yang lain tidak berkemampuan mendapat suara majoriti dalam Dewan Undangan Negeri tersebut.

(4) Dalam keadaan yang demikian kami memohon jasa baik Tun untuk, samada, mendapatkan perletakan jawatan Datuk Seri Joseph Pairin Kitingan selaku Ketua Menteri Sabah *atau* untuk membantu mengadakan suatu persidangan dewan Undangan Negeri dengan *segera* dan mengarahkan Datuk Seri Joseph Pairin Kitingan untuk menghadapi suatu undi kepercayaan. (Emphasis provided.)

(5) Jika Datuk Seri Joseph Pairin Kitingan enggan mematuhi salah satu arahan tersebut, kami dengan hormatnya memohon Tun melucutkan mandat beliau dan menjemput Tan Sri Haji Sakaran Dandai untuk membentuk sebuah kerajaan yang baru.

(6) Kami dengan hormatnya juga ingin merakamkan di sini perasaan penghargaan kami yang tidak terhingga di atas kepimpinan bijaksana dan ketabahan Tun dalam mempertahankan Perlembagaan.

Yang ikhlas
—Sgd—
(A list of 30 names with signatures)

The said affidavit-in-reply goes on to state that on 17 March 1994, Datuk Pairin, by a letter addressed to him, tendered his resignation as the Chief Minister which resignation he accepted in exercise of his personal discretion under art 7(1) of the Constitution. He considered the resignation as a resignation of the whole Cabinet under the said Article or in accordance with established constitutional convention, usage and practice. Upon the said resignation, all other members of the Cabinet have ceased to hold office at his pleasure under art 7(3) of the Constitution. The resignation letter is exhibited as 'TYT–5' and the contents are as follows:

17 Mac 1994

Tuan Yang Terutama
Yang di-Pertua Negeri Sabah
Istana
Kota Kinabalu

Kehadapan majlis Tuan Yang Terutama Yang di-Pertua Negeri Sabah

Per: Perletakan jawatan sebagai Ketua Menteri Sabah

Dengan segala hormat dan takzimnya, izinkanlah saya menyampaikan hasrat dan tujuan saya meletakkan jawatan sebagai Ketua Menteri Negeri Sabah mulai dari jam 2 petang 17 Mac 1994.

Saya juga ingin mengucapkan setinggi-tinggi penghargaan di atas kepercayaan Tuan Yang Terutama Yang Di-Pertua Negeri Sabah kepada saya sebagai Ketua Menteri Negeri Sabah selama ini. Sekian, terima kasih.

Yang benar
—Tt—
(Datuk Josph Pairin Kitingan)

On the same day he, the first defendant, appointed and swore in the second defendant as the new Chief Minister and called upon him to form the government in the exercise of his personal discretion under art 6(3) read together with art 10(2)(a) of the Constitution. The instrument of

appointment of the second defendant as the new Chief Minister is exhibited as 'SS–13' to the affidavit-in-reply No 3 affirmed on 21 July 1994 by Shee Hoa Sern @ Stephen, the ketua penolong setiausaha (Kabinet dan Perlembagaan) of the Jabatan Ketua Menteri, Kota Kinabalu, Sabah, and published in *Warta Kerajaan Sabah* on 31 March 1994 as gazette notification No 214. Then, on 24 March 1994, on the advice of the second defendant as the new Chief Minister pursuant to art 6(3) of the Constitution, the first defendant appointed and swore in the third to ninth defendants. Their instruments of appointment are exhibited as 'TYT–6' to 'TYT–12' and published in *Warta Kerajaan Sabah* on 28 April 1994 as gazette notification No 281.

The affidavit-in-reply No 2 of the defendants affirmed on 18 June 1994 by Lucy Yong @ Yong Nyen Ching, the acting press secretary to the former Chief Minister, Datuk Pairin, reveals that her duties included the preparing of speeches and press statements for Datuk Pairin and arranging for press conferences for him. On 16 March 1994, at about 11.30pm, Datuk Pairin dictated to her a one-page press statement to be finalized for him to deliver at a press conference on 17 March 1994, in connection with his resignation as the Chief Minister of Sabah. She accordingly finalized the press statement in English and Bahasa Malaysia. Both are exhibited as 'LY–1' as follows:

The English version:

*The Right Honourable Datuk Joseph Pairin Kitingan's Message Following His Resignation as the Chief Minister of Sabah on 17 March 1994*

Events in the last few days have forced a situation where we must tread carefully to avoid a further deterioration of the political situation. The turn of events have brought about a situation much different from that of 21 February 1994 when I was sworn in as the Chief Minister of Sabah after the Parti Bersatu Sabah had won 25 seats. With the appointment of the six nominated assemblymen, the total was brought to 31 seats. The situation is now reversed with the Barisan Nasional having the majority of 33 seats to PBS's 21, thus paving the way for it to form the next government.

By convention, the Chief Minister will have to resign if the ruling party no longer has the majority support of the assemblymen. Under the present circumstances, where the PBS majority is greatly reduced with the mass exodus of its assemblymen to the BN, my position as Chief Minister is no longer tenable. Having taken all matters into consideration, I have, therefore, decided to resign from the post of Chief Minister.

It is a sad decision for me but nonetheless I truly feel this is the most honourable thing to do under the present circumstances. I would like to take this opportunity to thank each and every one of you for your full support to ensure Parti Bersatu Sabah's victory in the just concluded state elections. We truly appreciated your mandate to give us another chance to govern the state.

In the context of what has transpired over the last few days, it is clear that some changes have occurred that tipped the balance of support in favour of the BN. I am now acknowledging the need to respond honourably to the

A situation. I made this decision to resign with a clear conscience and in the knowledge that I had tried to do my best for the people and the state in the past nine years.

As I offer my thanks and appreciation to the people of Sabah for giving us their trust and confidence, I would also like to take this opportunity to congratulate the new Chief Minister and his government which will be B formed today. It is my hope too that the new government will continue to look after the interests of the people and the state and work to ensure a developed, progressive and just society.

I would also like to assure the new Chief Minister and his government that I will co-operate and do my part to serve the people and the state. I sincerely wish him all the best.

C

The Bahasa Malaysia version:

*Kenyataan YAB Datuk Joseph Pairin Kitingan Berikutan Perletakan Jawatan Beliau Sebagai Ketua Menteri Sabah Pada 17 Mac 1994*

Peristiwa-peristiwa yang berlaku sejak akhir-akhir ini, telah mewujudkan D satu keadaan di mana kita mestilah mengambil langkah-langkah yang berhati-hati bagi mengelakkan keadaan politik daripada menjadi bertambah buruk. Peristiwa-peristiwa yang berlaku ini amat berbeza sekali dengan peristiwa-peristiwa yang berlaku pada 21 Februari 1994 semasa saya mengangkat sumpah sebagai Ketua Menteri Sabah setelah Parti Bersatu Sabah memenangi 25 kerusi. Dengan perlantikan 6 orang ahli dewan yang dilantik, maka Parti E Bersatu Sabah mempunyai 31 kerusi. Bagaimanapun keadaan sekarang telah menjadi sebaliknya di mana Barisan Nasional kini mempunyai majoriti 33 kerusi berbanding dengan PBS yang mempunyai 21 kerusi dan dengan itu telah membolehkannya untuk membentuk kerajaan.

Mengikut peraturan, Ketua Menteri haruslah meletakkan jawatannya sekiranya parti yang memerintah tidak lagi mendapat sokongan majoriti F ahli-ahli dewan. Dalam keadaan sekarang di mana majoriti PBS telah berkurangan dengan keluarnya beramai-ramai ahli-ahli dewan PBS menyertai BN, maka saya tidaklah lagi boleh menjadi Ketua Menteri. Setelah mempertimbangkan semua perkara maka saya dengan ini memutuskan untuk meletakkan jawatan saya sebagai Ketua Menteri.

G Ini adalah satu keputusan yang amat sedih sekali bagi saya, tetapi saya benar-benar merasakan bahawa ini adalah satu tindakan yang wajar dalam keadaan sekarang. Saya ingin mengambil kesempatan ini untuk menyampaikan setinggi-tinggi rasa penghargaan dan terima kasih kepada semua pihak yang telah memberikan sokongan padu bagi memberikan kemenangan kepada Parti Bersatu Sabah dalam pilihanraya umum negeri yang baru sahaja selesai. Kami sangat-sangat menghargai mandat yang telah H memberikan kami peluang sekali lagi untuk mentadbir negeri ini.

Melihat kepada peristiwa-peristiwa yang berlaku sejak akhir-akhir ini, maka jelaslah bahawa beberapa perubahan telah menyebabkan sokongan beralih kepada BN. Saya menyedari akan keadaan yang berlaku dan dengan ini saya mengambil keputusan untuk meletakkan jawatan dan di atas kesedaran bahawa saya telah berusaha dengan sedaya upaya untuk rakyat I dan negeri ini selama sembilan tahun yang lalu.

Dalam menyampaikan penghargaan dan terima kasih saya kepada seluruh rakyat di negeri Sabah yang telah memberikan sepenuh kepercayaan dan

keyakinan kepada kami, saya juga ingin mengambil kesempatan ini untuk mengucapkan tahniah kepada Ketua Menteri yang baru dan kerajaan yang akan dibentuk pada hari ini. Saya juga berharap semoga kerajaan yang baru akan terus memelihara dan melindungi kepentingan rakyat dan negeri Sabah dan berusaha untuk membentuk sebuah masyarakat yang membangun, progresif dan adil.

Akhir sekali saya ingin memberikan jaminan kepada Ketua Menteri yang baru dan kerajaannya bahawa saya akan memberikan kerjasama dan memainkan peranan saya dalam memberikan perkhidmatan kepada rakyat dan negeri Sabah. Dengan rasa yang setulus ikhlasnya, saya mengucapkan selamat maju jaya.

This affidavit-in-reply No 2 further reveals that at the material time, Datuk Pairin also directed her to arrange for a press conference at his official residence to be held on 17 March 1994 at about 2pm. The deponent was present at the appointed press conference attended by journalists from the local, national and international news and mass media. At the conference, Datuk Pairin read out the Bahasa Malaysia version of the press statement and copies thereof in English and Bahasa were distributed to the journalists present. The conference lasted about one hour. The news of Datuk Pairin's resignation as announced at the press conference was widely reported in all the local and national newspapers including *The Daily Express* and *The New Straits Times*. A copy each of the said news items published on 18 March 1984 are exhibited respectively as 'LY–2' and 'LY–3'.

Affidavit-in-reply No 1 of the defendants affirmed on 18 June 1994 by Shee Hoa Sern @ Stephen, the ketua penolong setiausaha (Kabinet dan Perlembagaan) of the Jabatan Ketua Menteri, Kota Kinabalu, Sabah reveals that on 11 May 1994, it was published in the *Borneo Mail* the clarification by Datuk Pairin concerning his resignation, which is exhibited as 'SS–12'. The heading of exh SS–12 is 'Pairin explains'. Inter alia, it states:

He [the plaintiff] claimed Pairin had resigned individually and voluntarily without involving his other ministers. Amir Kahar said he intended to take his case to court.

And Pairin yesterday attested to this saying he resigned on his own as head of the government and that his letter of resignation dated 17 March to the head of state, Tun Haji Mohd Said Keruak [the first defendant], did not involve his other ministers.

He said he made the decision to resign following convention that he did not command the majority support of the assemblymen, including his own, some of [whom] had defected to Barisan Nasional or formed their own parties.

'The act of tendering my resignation may have been interpreted to have meant that the whole Cabinet must resign. That was my interpretation and that of some others too but many others interpreted it in a different light.

I can't help what they are thinking or say what is the real interpretation.'

A He said while he was talking about following convention others were asking the legal question. 'I am now in doubt,' he declared.

Pairin said if the matter were to be viewed from the legal point of view, then it would be a question of looking at the State Constitution.

Towards this end he pointed out that he was not questioning anything but that his Ministers are, and that he would leave it to them to pursue the B matter.

From the evidence revealed in the various affidavits filed both for the plaintiff and for the defendants, it appears that by 13 March 1994, three of the members of the Assembly from the PBS crossed over to the BN, thereby reversing the original majority between the PBS and the BN, C giving the BN 26 seats as against PBS's 22 seats of the total 48 elected seats in the Sabah Legislative Assembly. Facing the reality of the situation, to my mind, led Datuk Pairin on 13 March 1994 to request the first defendant to dissolve the Assembly and, as he stated in his affidavit, 'so as to call for a fresh mandate from the people ...'. He must has felt that the D confidence of the members of the Assembly in him as the Chief Minister was no longer secured. However, the first defendant withheld the consent to his request. According to art 10(2) of the Constitution, this power to withhold the consent is a power exercisable personally according to his subjective judgment and is therefore, non-justiciable. Then on 16 March 1994, the first defendant received a petition signed by 30 persons exhibited E as 'TYT–4' who claimed to be members of the Legislative Assembly representing the BN alleging that they no longer had the confidence in and would no longer support Datuk Pairin as the Chief Minister of Sabah. They also informed the first defendant that the BN and its supporters now controlled the majority of members in the Assembly and that Datuk Pairin F or other leaders or parties were incapable of obtaining a majority voice in the Assembly. In the circumstances, they requested the first defendant to get Datuk Pairin to tender his resignation as the Chief Minister or for the first defendant to convene the meeting of the Assembly and to direct Datuk Pairin to face a vote of confidence. The petition further requested the first defendant that in the event that Datuk Pairin refused to comply G with any of the said directions, he was to withdraw the mandate given to Datuk Pairin and to invite the second defendant to form a new government. This petition, on the same day, was screened over the RTM and Datuk Pairin saw it. Then that same night at about 11.30pm, Datuk Pairin got exh LY–1 prepared by his acting press secretary with H instructions to arrange for a press conference to be held the following day at about 2pm which, according to the said secretary, was duly held and attended by journalists both from local and foreign media where copies both in the English and the Bahasa Malaysia versions were distributed to those present. In the meantime, before the said press conference, Datuk Pairin tendered his resignation letter to the first defendant which is exhibited I as 'TYT–5' to the affidavit-in-reply No 4 of the defendants. The text of the press statement of Datuk Pairin mentioned, inter alia, that the turn of events had reversed with the BN having the majority of 33 seats to PBS's

21, thus paving the way for the BN to form the next government. It is to be noted here that the 33 seats of the BN mentioned by Datuk Pairin must have included the six seats occupied by the nominated members appointed pursuant to art 14 of the Constitution. Thus, in respect of the elected seats, the BN would have only 27 seats. In any event, Datuk Pairin had acknowledged that the BN was in the majority in the proportion of 27:21. Quoting the convention, the statement went on to say that by it the Chief Minister would have to resign if the ruling party no longer had the majority support of the assemblymen. By that, I take it to mean that Datuk Pairin must have been satisfied that the confidence of a majority of the members of the Legislative Assembly was no more with him as otherwise in his press statement he would not have said that the changes that occurred had tipped the balance of support in favour of the BN and to congratulate the new Chief Minister and his government which he knew would be formed that day. No doubt he uses the word 'support' as against the term 'confidence' used in the Article. The term 'confidence' is not defined in the Constitution and neither is the word 'support' found in it. In my view, the difference in the meaning of the two words is not real and substantial but merely a matter of saying the same thing in a different way. When someone has no confidence in another, he is in effect not in support of that other in the sense that he no longer has the trust in that other. When one supports the other he will vote for that other on any issue, just as when he has confidence in that other, he will vote for that other on any similar issue.

The said press statement of Datuk Pairin goes on to state:

> Under the present circumstances, where the PBS majority is greatly reduced with the mass exodus of its assemblymen to the BN, my position as Chief Minister is no longer tenable. Having taken all matters into consideration, I have, therefore, decided to resign from the post of Chief Minister.

No doubt in the view of Datuk Pairin in the light of the circumstances, his position as the Chief Minister is no longer tenable. But what about the position of the other members of his Cabinet? Article 7(1) of the Constitution provides that in the circumstances, he is required to tender the resignation of the members of the Cabinet which is made up of himself as the Chief Minister and the other members who are styled as 'Ministers'. See art 6(2). Therefore, the mere fact that Datuk Pairin chose to tender the resignation of the Chief Minister only would not make the other members remain in office. The resignation of Datuk Pairin in the circumstances is a resignation of the whole of the members of his Cabinet including the plaintiff. It follows that the issue of resignation and the revocation of the appointment of other members would no longer arise. The intention behind the requirement in art 7(1) for a Chief Minister to tender the resignation of the members of the Cabinet is, in my view, to enable a new Cabinet to be formed pursuant to art 6 of the Constitution. Articles 6 and 7 of the Constitution state:

6 (1) There shall be a State Cabinet to advise the Yang di-Pertua Negeri in the exercise of his functions.

(2) The Cabinet shall consist of a Chief Minister, and not more than eight nor less than four other members, (to be styled 'Ministers') appointed in accordance with clause (3).

(3) The Yang di-Pertua Negeri shall appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly and shall appoint the other members mentioned in clause (2) in accordance with the advice of the Chief Minister from among the members of the Assembly:

Provided that if an appointment is made while the Legislative Assembly is dissolved a person who was a member of the last Assembly may be appointed but shall not continue to hold office after the first sitting of the next Legislative Assembly unless he is a member thereof.

(4) Notwithstanding anything in this Article, a person who is a citizen by naturalisation shall not be appointed Chief Minister.

(5) The Chief Minister shall not hold any office of profit and shall not actively engage in any commercial enterprise.

(6) The Cabinet shall be collectively responsible to the Legislative Assembly.

(7) For the purpose of Clause (3) of this Article, where a political party has won a majority of the elected seats of the Legislative Assembly in a general election, the leader of such political party, who is a member of the Legislative Assembly, shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly.

7 (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.

(2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.

(3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri.

Article 7(1) envisages a situation where if the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, unless the Assembly is dissolved, the Cabinet shall be dissolved, thus opening the way for a new Cabinet to be formed. This new Cabinet can comprise members from the same party or otherwise, provided that the person to be appointed as the new Chief Minister to head this new Cabinet is, in the judgment of the Yang di-Pertua Negeri, likely to command the confidence of a majority of the members of the Assembly. See art 6(3) of the Constitution. The dissolution of the existing Cabinet under art 7

does not involve the Yang di-Pertua Negeri or necessarily, the members of the Legislative Assembly. The Article merely requires the Chief Minister to tender the resignation of the members of his Cabinet if he ceases to command the confidence of a majority of the members of the Legislative Assembly. To hold otherwise, in instances where a Chief Minister who in fact knows that he has ceased to command the confidence of a majority of the members of the Assembly and cannot resign but has to wait for the Assembly to be summoned and then for the Assembly to vote on the confidence would, in my view, create a legal absurdity and would result in a ludicrous situation. As the learned counsel for the defendants puts it, this situation is definitely against the democratic principle upon which the Constitution and government are based. Thus, once a Chief Minister in fact knows that he has lost the confidence of a majority of the members of the Assembly, he should not wait for a vote of confidence to be formally tabled in the Assembly but should immediately take the honourable way out by tendering the resignation of his Cabinet. Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of a majority of the members of the Assembly and it is not necessary, therefore, for the Yang di-Pertua Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet. This is not only the effect of art 7 of the Constitution but it is the established convention. See *Adegbenro v Akintola* [1963] AC 614 at p 631; [1963] 3 All ER 544 at p 550; [1963] 3 WLR 63 at p 73 in regard to the established convention. The fact of a Chief Minister ceasing to command the confidence of a majority of the members of the Assembly can be evidenced by various situations and circumstances. It can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are not by any means exhaustive. There is no where in the Constitution to say that the only evidence of such fact must be through the actual vote in the Assembly.

A B C D E F G H I

It follows, therefore, that if the Chief Minister does not tender the resignation of the other members of his Cabinet wherein the Cabinet is to be treated as dissolved under the circumstances envisaged by art 7(1) of the Constitution, their offices are deemed to have been vacated. By formality, the Chief Minister is required to tender the resignation of the Cabinet but if he chooses to tender only his resignation, the other members of his Cabinet cannot say that they retain the office because the Chief Minister does not tender their resignation. The blame, if any, lies upon the Chief Minister for not complying with the requirements of art 7(1).

But the learned counsel for the plaintiff contends otherwise. He submits that the test of confidence for the purpose of art 7(1) must be through a motion to be tabled before the Legislative Assembly and to be voted upon by members of the Assembly and cannot be deduced from other extraneous circumstances. In support of his contention, he quoted

A *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187. His Lordship in that case decline to follow the decision of the Privy Council in *Adegbenro v Akintola* when he says at p 193:

> In my view, the Privy Council's judgment relating to the Constitution of Nigeria does not apply to the Constitution of Sarawak because of the
B following distinguishing features and circumstances:
>
> (1) In the Nigerian case it was mathematically beyond question that more than half the House no longer supported the Premier.
>
> (2) The measurement in Nigeria was a measurement of 'support', not of 'confidence'. The Sarawak Constitution is dated subsequent to the
C decision of *Adegbenro v Akintola* and it does seem to me that the 'confidence' of a majority of members, being a term of art, may imply reference to a vote such as a vote of confidence or a vote on a major issue.
>
> (3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.
>
D (4) In Nigeria the Governor had express power to assess the situation 'as it appeared to him'.
>
> (5) In Nigeria all Ministers, including the Premier, held office 'during the Governor's pleasure'; although there was an important proviso to this.
>
> All the above five points were peculiar to Nigeria, and not one of them
E applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negeri. Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private views.

F So it is clear that the reasons for his Lordship differing in his view from the decision of the Privy Council in *Adegbenro v Akintola* was because of the five distinguishing features and circumstances appearing in that case. As to the first distinguishing feature and circumstance, it does not happen in the present case. In this case the feature and circumstance are the same as that
G found in the Nigerian case in that it was mathematically beyond question that more than half the members of the Assembly has expressed in the petition that they no longer had confidence in Datuk Pairin as the Chief Minister. On the second, no doubt the measurement in Nigeria was a measure of 'support', not of 'confidence' but for the reason given earlier in
H this judgment, to my mind the effect is the same. In any event, the view of his Lordship is that the 'confidence' of a majority of members may (and not shall) imply reference to a vote such as a vote of confidence or a vote on a major issue. In that light, circumstances may arise that in a given situation the evidence of ceasing to command the confidence of a majority
I may be available from other sources which could indicate what action the members have decided to take when if they called upon to vote in the Assembly. In this case, from the petition, the 30 members not only said that they no longer had confidence in Datuk Pairin as the Chief Minister

but they also requested the first defendant to convene the Assembly and to direct Datuk Pairin to table a motion of confidence. However, the Assembly was not convened to enable the action to be taken. In addition to that, Datuk Pairin himself in his press statement stated that he resigned because the ruling party, ie PBS of which he is the leader, no longer had the majority support of the Assemblymen, for owing to the defection of the members of his party, the position was reversed with the BN having the majority, and thus paving the way for the BN to form the next government. The third and fifth features and circumstances mentioned by his Lordship do not arise in this case. On the fourth feature and circumstance, no doubt the Nigerian case concerns the subjective decision of the Governor but the Nigerian case before the Privy Council concerns the meaning to be given to the expression 'Premier no longer commands the support of a majority of the members' as mentioned by Viscount Radcliffe ([1963] AC 614 at p 628; [1963] 3 All ER 544 at p 548; [1963] 3 WLR 63 at p 70). In the Sabah Constitution, the expression 'to command the confidence of a majority of the members of the Assembly' appears in arts 6(3) and 7(1). Article 6(3) concerns the subjective decision of the Yang di-Pertua Negeri just as s 33(10) of the Constitution of Western Nigeria concerns the subjective decision of the Governor, but what we are concerned with now is with the meaning to be given to the expression 'to command the confidence of a majority of the members of the Assembly'. A different meaning cannot be given to the same expression appearing in art 6(3) and art 7(1) of the Sabah Constitution. In my view, one involves the state of mind of the head of state — art 6(3), and the other involves the state of mind of the Chief Minister — art 7(1), but in as far as the meaning to be given to the said expression in arts 6 and 7, that expression must bear the same meaning. In my view, for the reason I gave earlier in this judgment, a vote in the Assembly is not the only means to determine the confidence but depending on the circumstances. A situation may arise where other extraneous matters or materials may provide sufficient evidence to establish that fact of the Chief Minister ceasing to command the confidence of a majority of the members of the Assembly for the purpose of art 7(1) of the Constitution. As in this case, there is this evidence of the petition sent to the first defendant by 30 members on 16 March 1994 who claimed to belong to the BN expressing no confidence in Datuk Pairin as the Chief Minister, corroborated by the evidence of Datuk Pairin himself in his press statement prepared soon after seeing the images of the petition over the television, followed by his resignation the next day and the reading and distributing of the press statement at about 2pm on 17 March 1994 and reaffirmed by his 'explanation' which appeared in the *Borneo Mail* of 11 May 1994 (exh SS–12). In the circumstances, *Stephen Kalong Ningkan*'s case [1966] 2 MLJ 187 must be distinguished, being a decision based on its own facts and circumstances. The hard fact in that case was that the alleged loss of confidence was highly suspect. There was a top secret representation made by persons outside the Council Negeri which on the face of it did not disclose that the representors were the majority of

A B C D E F G H I

members in the Council Negeri. Also, the fact represented was suspicious in the sense that the letter was not signed by all the persons listed in the letter and even in respect of those who signed, one of them was represented only by a 'chop'. It is for that reason the learned judge said at p 193: 'Men who put their names to a "Top secret" letter may well hesitate to vote publicly in support of their private views'. It is also disclosed in the report of the case that on 14 June 1966, ie the date of the letter, when there was a meeting of the Council Negeri, Bills were passed without opposition despite the presence of five members of the Sarawak United Peoples Party and one Machinda member, who normally behaved as the opposition. Also on that day, there was no motion of confidence put in the Council Negeri nor had there been any defeat of a Government Bill. Whereas in this case the fact that 30 members against the PBS's 18 elected members expressing their non-confidence in the Chief Minister would clearly indicate mathematically beyond question that the BN was in the majority and these majority had ceased to have confidence in him. Also, in *Stephen Kalong Ningkan*'s case, the Governor acted to dismiss the Chief Minister even though the latter did not refuse to resign provided he was satisfied that the majority in the Council Negeri ceased to have confidence in him and for that he had requested the Governor to convene the Council Negeri to have the issue tested. This was never acceded to but instead the Chief Minister and the members of his Cabinet were declared by the Governor to have ceased to hold office with immediate effect and he proceeded to appoint a new Chief Minister. Whereas in the present case, that issue does not arise. The Chief Minister resigned on his own accord and the reason for the resignation was sufficiently given in his press statement and in the 'explanation' given to the *Borneo Mail* on 11 May 1994 giving even his interpretation of the matter. In the circumstances, I would adopt the dicta of Viscount Radcliffe who delivered the judgment of the Privy Council in *Adegbenro v Akintola* [1963] AC 614 at pp 628–629; [1963] 3 All ER 544 at pp 548–549; [1963] 3 WLR 63 at pp 70–71, when his Lordship says:

> What, then, is the meaning of the words 'the Premier no longer commands the support of a majority of the members'? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognizes the basic assumption of that Constitution, as it has been developed, that, so long as the elected House of Representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognizes also one other principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

> It is said, too, that the 'support' that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think, however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned.

Based on what was said by Viscount Radcliffe in the case, the evidence that a Chief Minister ceases to command the confidence of the majority of members of the Assembly for the purpose of art 7(1) of the Sabah Constitution, may be found from other extraneous sources and are not confined to the votes taken in the Legislative Assembly provided that, those extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the first defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the first defendant to exercise his discretion under art 6(3) to appoint the second defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. The expression 'lost of confidence' is not, therefore, confined to a vote taken in the Assembly but depends on the circumstances, which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the Assembly itself. If it is the intention of the framers of the Constitution that it be so then an express provision to that effect would have been so provided. In this case, there was no reason at all for Datuk Pairin to have willingly tendered his resignation as the Chief Minister if he honestly believed that he still retained the confidence of the majority of the members of the Assembly. So, in the circumstances, I am of the view that the resignation of Datuk Pairin on 17 March 1994 was in fact a resignation of the whole members of his Cabinet, including the plaintiff, on account of him ceasing to command the confidence of a majority of the Legislative Assembly as envisaged by art 7(1) of the Constitution notwithstanding that the letter of resignation was silent as to the resignation of the other members of his Cabinet including the plaintiff. Consequently, on the acceptance of the resignation by the first defendant, the whole Cabinet of Datuk Pairin collapsed. There is no longer the necessity for the first defendant at any time after that to revoke the appointments of the other members of Datuk Pairin's Cabinet in order to dissolve the Cabinet of which he was the leader.

There is in fact another matter which arose out of the submission of the learned counsel for the plaintiff which is not really relevant in the light of what I held earlier. For completeness, I will mention it here. The learned counsel submits that in order for the appointment of the third to the ninth defendants on 24 March 1994 to be legal and constitutional, the first defendant must first revoke the appointment of the other members of Datuk Pairin's Cabinet. In order to do that the second defendant, the new Chief Minister, ought to have advised the first defendant, which he never did. Under art 7(2), the Yang di-Pertua Negeri may revoke the appointment of a member of the Cabinet other than the Chief Minister acting in accordance with the advice of the Chief Minister. In the light of my decision above, this issue would no longer arise. However, if there needs to be a revocation of the appointment at all under this clause, it is my view that the Chief Minister to tender the advice to the Yang di-Pertua Negeri must be the Chief Minister of the Cabinet of which these other members are appointed as such, for it was this Chief Minister who brought those members into his Cabinet pursuant to art 6 of the Constitution. If this Chief Minister himself has ceased to hold office, then the new Chief Minister has no power to advise the Yang di-Pertua Negeri of their removal unless before the intended advice, those members were reappointed as members in the Cabinet of this new Chief Minister whereby pursuant to the reappointment, those members become the members of his Cabinet. This is simply because those members are not members of the Cabinet in being for the lack of reappointment of them into this Cabinet. On the question of the need for reappointment of the members of the previous Cabinet into the new Cabinet upon the resignation of a Chief Minister so as to enable the previous members to remain as members of the Cabinet, the matter is not something new in Sabah. According to the evidence in affidavit-in-reply No 3 of the defendants, when Dato' Peter Lo Su Yin was appointed the Chief Minister on 1 January 1965 upon the resignation of the then Chief Minister, Dato' Donald Stephens, the members of the whole Cabinet had to be reappointed by the Yang di-Pertua Negeri in accordance with the advice of Dato' Peter Lo Su Yin. Exhibit SS–15 is State of Sabah *Government Gazette* dated 15 January 1965, notification No 47. Again, when Tun Datuk Hj Mohd Fuad Stephens together with three of his Cabinet Ministers died in a plane crash on 6 June 1967, Datuk Harris bin Mohd Salleh was appointed and sworn in as the new Chief Minister on the same day. The remaining four Ministers of the previous Cabinet were reappointed and sworn in on 9 June 1976. Exhibits SS–16, SS–17, SS–18, SS–19 and SS–20 are copies of their oaths of office. On both the occasions, there were neither resignations of the incumbent Ministers nor revocations of their appointments by the Yang di-Pertua Negeri before their reappointments into the new Cabinet. Secondly, according to the evidence in affidavit-in-reply No 4 of the defendants, the deponent was once appointed to be a member of the Cabinet of the Chief Minister, Dato' Donald Stephens. Exhibit TYT–1 is the *Gazette* notification of the appointment. When Dato' Donald Stephens tendered his resignation as the Chief Minister, he did not tender the

resignation of the members of his Cabinet and there was also no revocation of their appointments as members of the Cabinet. The deponent himself did not tender his resignation as a member of the Cabinet. When Dato' Peter Lo Su Yin took over as the Chief Minister, on his advice, the other members of the previous Cabinet were reappointed into this new Cabinet. Exhibit TYT–2 is the *Gazette* notification. However, the learned counsel for the plaintiff argues that the fact that they were reappointed into the new Cabinet without their previous appointments being revoked or they themselves tendering their resignations goes to show that they never ceased to be members of the Cabinet. I find that it is very difficult to follow this line of argument because if it were so, why the need to be reappointed? The purpose for the reappointment into a new Cabinet is that had it not been for that fact, they would not be members of the Cabinet because by the dissolution of the previous Cabinet they were deemed to have vacated their offices. So, we see that apart from the constitutional provisions, it is a well-established convention and usage in Sabah that upon the death or resignation of the Chief Minister, the Cabinet stands dissolved, the appointments of all its members were deemed to have been vacated, and if any of those members were to continue to be in the new Cabinet they had to be reappointed upon the advice of the new Chief Minister.

A Cabinet is a body constituted for the purpose of advising the head of state in the exercise of his executive functions except for that which the Constitution reserves for the head of state personally to exercise in accordance with his personal discretion The Cabinet is to consist of a Chief Minister and certain other members to be appointed in accordance with art 6(3) of the Constitution, ie in accordance with the advice of the Chief Minister. Members of a Cabinet function as a team and as spelt out in art 6(6), they are collectively responsible to the Legislative Assembly. Persons outside this constituted Cabinet are not members of this Cabinet even though they were in the previous Cabinet which is no longer in being. Those members cannot be in this newly constituted Cabinet unless they are reappointed into it on the advice of the Chief Minister who will be the head of this newly constituted Cabinet. By logic, the new Chief Minister will advise the appointment of a member whom he believes could work smoothly with him in the Cabinet so that in that sense that Cabinet could truly be collectively responsible to the Legislative Assembly. So, how is this new Chief Minister to advise on the revocation of the appointment of those members from the previous Cabinet? To require him to do so is a fetter on his discretion to advice the head of state as to the choice of the members to be with him in his Cabinet. The Cabinet as provided in the Constitution is not in being like an ordinary government department manned by public servants, where the servants come and go yet the department remains. In the circumstances, the submission so made lacks any merit.

Therefore, in the light of the evidence before me I am of the view and I so hold that notwithstanding the contents of the resignation letter, the resignation of Datuk Pairin on 17 March 1994 is a resignation of his

Cabinet pursuant to art 7(1) of the Sabah Constitution. My view is fortified further by the 'explanation' made by Datuk Pairin to the press as contained in exh SS–12 to the affidavit-in-reply No 1 of the defendants which clearly indicates the intention of Datuk Pairin in tendering the said letter of resignation to the first defendant. Inter alia, he was quoted to have said and was never denied, as follows:

> The act of tendering my resignation may have been interpreted to have meant that the whole Cabinet must resign. That was my interpretation and that of some others too but many others interpreted it in a different light.

To summarize, for the reasons given above, it is my judgment that the evidence to establish that a Chief Minister ceases to command the confidence of a majority of the members of the Assembly for purpose of art 7(1) of the Sabah Constitution need not necessarily be dependent upon the actual motion to be tabled in the State Legislative Assembly. It may be available from sources outside the Legislative Assembly depending on the circumstances of each case. In this case, based on the circumstances presented to it, the court is satisfied that the resignation of Datuk Pairin as the Chief Minister, on 17 March 1994 is a resignation pursuant to him ceasing to command such a confidence. As a result, upon his resignation being accepted, the Cabinet constituted on 21 February 1994 was dissolved and with it went the appointments of the other members of that Cabinet, including the plaintiff. Consequently, the appointments of the plaintiff made on 21 February 1994 would not any longer subsist in law. As the Cabinet constituted on 21 February 1994 was dissolved, the appointment of the second defendant as the new Chief Minister by the first defendant on 17 March 1994 was valid and constitutional. The appointments of the second to the ninth defendants on 24 March 1994 was in accordance with the provisions of art 6(3) of the Constitution and are, therefore, valid. The gap between the dissolution on 17 March 1994 of Cabinet formed on 21 February 1994, and the formation of a new Cabinet on 24 March 1994 upon the appointments of the second to the ninth defendant on that date is not illegal and unconstitutional. But the learned counsel for the plaintiff argues that Yang di-Pertua Negeri must at all times have a Chief Minister and his Cabinet to advise him on the performance of his constitutional function. In support, he cited a passage from *Indian Constitutional Law* (4th Ed) by MP Jain at p 87 concerning the council of ministers in India in connection with the provisions of art 74 of the Indian Constitution. The passage is as follows:

> According to art 74(1), there shall be a Council of Ministers with the Prime Minister at its head. The provision is mandatory and at no point of time can the President dispense with this body. The Council of Ministers remains in office even when the Lok Sabha is dissolved. The Supreme Court has refused to accept the contention that during the dissolution of the Lok Sabha, the President can rule with the help of advisers. That will change the whole concept of the Executive. Accordingly, 'the President cannot exercise the executive power without the aid and advice of the Council of Ministers'.

There is no dispute about that. Article 74(1) of the Indian Constitution is almost similar to art 6(1) of the Sabah Constitution. But, as I understand the passage above quoted, it is not intended to mean that there must be at all times a Cabinet in existence, otherwise it would be unconstitutional. What it means is that there must be a Cabinet to advise the head of state, for the head of state cannot dispense with this body if he is to exercise his constitutional functions. In other words, if no such body is in existence, the head of state is handicapped in exercising his constitutional function. As in our present case, the gap so created by having no Cabinet in existence between 17 March 1994 and 24 March 1994 would merely hamper the exercise of the executive function of the first defendant as the executive authority of the State where that function by the Constitution requires the advice of the Cabinet. Upon those findings, the application of the plaintiff by this amended originating summons must necessarily fail and I accordingly dismiss the said application with costs to the defendants to be taxed, unless agreed.

*Application dismissed.*

Reported by Kevin Ooi